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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MALIBU MEDIA,LLC,

Plaintiff

v.

ROBERT WALLER,

Defendant

Civil Action No.:2:15-cv-03002-WHW-CLW

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendant, Robert Waller ("Defendant"), by and through undersigned counsel hereby submits this Memorandum of Law in Support of a Motion to Dismiss ("Motion") filed contemporaneously herewith, and in support thereof states:

I. Introduction

Plaintiff, Malibu Media, LLC—a prolific litigant, ("Plaintiff") filed a complaint with this Court on April 29, 2015 alleging copyright infringement under the United States Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 et seq. ("Copyright Act") against JOHN DOE subscriber assigned IP address 24.0.1.237 ("Complaint"). Subsequently, Plaintiff was granted leave to serve a third-party subpoena on the internet service provider, Comcast ("ISP") to "seek the name and address of subscriber (IP address 24.0.1.237)" ("Subpoena"). Order Granting Motion for Leave to Serve a Third-Party Subpoena, *Malibu Media, LLC. v. John Doe subscriber assigned IP Address 24.0.1.237*, No. 2:15-cv-3002-WHW-CLW ("Order"). In granting the motion for the Subpoena, the Court explicitly cautioned Plaintiff that the internet protocol ("IP") address would not necessarily reveal Defendant's identity and required Plaintiff to "determine whether that particular subscriber illegally distributed[, reproduced, performed and/or displayed] the copyrighted work." Order (citation omitted). Plaintiff in this instance failed to comply with the Court's Order and has not demonstrated that the named Defendant has in fact been identified as the person who is responsible for the illegal conduct. Therefore, without a further determination of the identity of the true copyright infringer, it is impossible for the Complaint as amended, to establish that any defendant, let alone the Defendant in this case, has illegally distributed, reproduced, performed and/or displayed the copyrighted work.

In filing and amending a complaint, plaintiffs have the opportunity to state facts and allegations that the court is required to take as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In copyright infringement cases, where the actual infringer is unknown, this Court as well as other courts have ruled that "[p]laintiff[s] may [not] solely rely on the subscribers' affiliation with the IP address in question as a basis for its claims." Order. Plaintiff has ignored this Court and other courts' rulings and relied solely on information that allegedly identified the ISP subscriber and the address affiliated with the subscription, 78 Bucknell Avenue, Woodbridge, NJ 07095 ("Identified Address") ("ISP Subscription Details"). Plaintiff's only amendment to the Complaint was to arbitrarily replace "John Doe" with "Robert Waller" and add an Identified Address ("Amended Complaint"), but consequently, no facts have been established to support Plaintiff's allegations that Defendant has infringed Plaintiff's copyright. Thus, in this case, the only basis for Plaintiff's claims is their sole reliance on an IP address said to be affiliated with Defendant. Not one allegation identifies the actual infringer because if not for the ISP Subscription Details, which were never provided for the record, Defendant would not be named in this lawsuit.

Although the Court did note that the information regarding the subscriber "could [possibly] lead to the identification of the infringer" (Order), this does not relieve Plaintiff of the obligation to determine the identity of the actual infringer. The Court explicitly stated that the information regarding the subscriber of the IP address "would not necessarily reveal the appropriate defendant's identity", and as such, Plaintiff merely determined "information regarding the ISP subscriber", and not the identity of the infringer. Order. Per the Court's instructions, Plaintiff should have determined if the alleged subscriber was the person who "illegally distributed", reproduced, performed, and/or displayed "the copyrighted work", rather than use the judicial system to pursue a defendant as a tactic to uncover information about the actual infringer. It is evident that Plaintiff did not follow the Court's instructions and instead attached Defendant's name to the Amended Complaint without determining if Defendant was the actual infringer. Therefore, it is improper for Plaintiff to name the Defendant, or any other defendant as the copyright infringer in this case. Plaintiff was in a haste to link any defendant to the infringement, and as a result, Plaintiff refused to abide by the Court's Order and named Defendant as the copyright infringer, which seems to be Plaintiff's modus operandi in cases identical to this one.

In addition to Plaintiff's blatant disregard of the Court's Order, it is important to note that Plaintiff has not provided the ISP Subscription Details for the record.

As of today, more than three months after Defendant has "enter[ed] an appearance in this case", Plaintiff has not provided copies of the ISP Subscription Details to Defendant pursuant to the Order. Order. Although, the accuracy of the ISP Subscription Details has not been verified nor is it known if the information exists, Plaintiff mysteriously added Defendant's name and the Identified Address to the Amended Complaint.

Justifiably, courts have openly discussed the fear of plaintiffs abusing the judicial system and have explicitly stated that the courts "want[] to make sure that Plaintiff's contentions [are] supported by evidence that goes beyond the identity of the subscriber to the IP address." *AF Holdings, LLC v. Rogers*, 2013 US Dist. LEXIS 11929, at *7 (S.D. Cal. Jan. 29, 2013). In this instance, Plaintiff is at risk of abusing the judicial system. The Amended Complaint falls within the scope of caution asserted by the court because there is no evidence beyond the identity of the subscriber to the IP address. Without the presence of the IP address, Plaintiff would not be in a position to advance any Complaint whatsoever. Therefore, Plaintiff's actions fall directly within the scope of the courts' fear because, at best, the Amended Complaint is nothing more than 34 paragraphs of technological information and conclusory statements that do not contain evidence to plausibly allege that Defendant has committed copyright infringement. In short, the Amended Complaint is flawed as it lacks facts and necessary allegations to link Defendant to the copyright infringement, and as such, is wholly insufficient and does not meet the pleading standard as required under *Ashcroft* and *Twombly.*

II. Legal Standard

Pursuant to the Rules of Federal Civil Procedure, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The courts have followed this precedent in determining whether a complaint meets the pleading requirement of Fed. R. Civ. P. 8(a)(2). The standard under Fed. R. Civ. P. 8(a)(2) "does not require 'detailed factual allegations', but it demands more than an unadorned the-defendant-unlawfully-harmed-me-accusation." *Id.* (quoting *Twombly* at 555). To determine whether a claim to relief is plausible, the court "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* The court further explains that "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly* at 557).

III. Argument

Fundamentally, copyright infringement cases that are linked solely to IP addresses are ambiguous. Because of this ambiguity, it is important that plaintiffs are not afforded the opportunity to abuse our justice system and ensnare innocent ISP subscribers through the litigation process. *See generally AF Holdings*, 2013 U.S. Dist. LEXIS 11929. Under the pleading standard, Plaintiff is only required to state a short and plain statement of the facts, which are to be viewed in a light most favorable to the Plaintiff. *See Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). However, in this case, Plaintiff has pled no facts or allegations to establish that Defendant has infringed Plaintiff's copyright. Indeed, because Plaintiff has pled no facts to support the allegations contained in the Amended Complaint, the Court cannot be charged nor expected to view any facts in the light most favorable to Plaintiff, as none exist. Thus, Plaintiff's Amended Complaint is nothing more than an "unadorned" accusation that Defendant has harmed Plaintiff. Because the Amended Complaint only pled facts that are merely consistent with Defendant's liability, it fails to show more than the sheer possibility that Defendant acted unlawfully. Therefore, the Amended Complaint does not state a claim to relief which is plausible on its face and falls far short of the standard found in *Twombly*.

a. **Plaintiff's Amended Complaint Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiff has not Established that Defendant is the Copyright Infringer.**

The Court's four page Order acknowledged "that the information sought by the subpoena is relevant" because "[i]t is [] possible [] the subscriber either knows or has additional information which could lead to the identification of the alleged infringer." Order. In the same vein, it is important not to lose sight of the Court's explicit warning found in the same order – that the information sought by Plaintiff in the Subpoena would "only provide information regarding the ISP subscriber", and after receiving the information, "Plaintiff would have to determine whether that particular subscriber illegally distributed[, reproduced, performed and/or displayed] the copyrighted work." Order. Order at *4 n. 2; *Malibu Media, LLC v. Does 1-11*, 2013 U.S. Dist. LEXIS 26217, at *13 n.2 (D.N.J. February 26, 2013); *Malibu Media, LLC v. Doe*, 2014 U.S. Dist. LEXIS 140939, at *7 n.2 (D.N.J. October 1, 2014); *Malibu Media, LLC v. Doe*, 2015 U.S. Dist. LEXIS 95418, at *7-8 n.2 (D.N.J. July 22, 2015)(warning Malibu Media, LLC that a person's act of subscribing to an ISP alone does not create a sufficient factual basis for alleging that the subscriber is the copyright infringer). To speculate that the named Defendant may have information regarding the identity of the actual infringer is an insufficient basis to hold the Defendant accountable as the copyright infringer, and to consequently allow Plaintiff to haul Defendant into court on such information that has not been substantiated is precisely what courts have warned against which is in direct contravention of the principals of the judicial system.

Plaintiff has amended the Complaint without any regard for the Court's instructions. More specifically, there is not one factual account that Defendant illegally distributed, reproduced, performed and/or displayed the copyrighted work; in fact, the only information that exists is based on an identified IP address. And, the Court has already deemed it insufficient for Plaintiff to rely solely on such information in a case where the infringer is unknown. In addition, the courts require plaintiffs to determine whether the subscriber illegally distributed, reproduced, performed and/or displayed which Plaintiff's Amended Complaint failed to do. Upon a plain reading of the Amended Complaint, all Plaintiff has done is replace "John Doe" with "Robert Waller" without a further determination or a factual basis to support that Defendant is indeed the infringer.

Plaintiff's Amended Complaint is insufficient under the Rule 8(a)(2) pleading standard for both *Twombly* or *Ashcroft* because there are no facts or allegations that plausibly allege that Defendant is responsible for the claims of copyright infringement. Namely, Plaintiff has failed to plead any facts that (1) show Defendant was present at the Identified Address at the time of the alleged infringement, (2) demonstrate Defendant's use of the device at the time of the alleged downloading of Plaintiff's copyrighted works, or (3) that the act of copyright infringement occurred at the Identified Address. The Amended Complaint merely contains naked allegations that the IP address in issue, IP address 24.1.0.237, was used to illegally distribute, reproduce, perform and/or display the copyrighted works. Therefore, in accordance with the pleading standard, there are no facts or allegations to show that Defendant is responsible for any conduct, let alone one hundred and twenty eight (128) counts of infringing conduct.

Plaintiff, by virtue of submitting the Amended Complaint, expects the Court to believe that Defendant has infringed on the copyrighted works solely based on an ISP subscription. However, Plaintiff has not pled any facts that place Defendant at the Identified Address. Plaintiff has also ignored the fact that multiple people have the ability to access the Identified Address and the IP address associated with the subscription. Plaintiff attempts to discount the technological advancements of the world; it is common knowledge that laptops, cellular phones, and tablets are no longer stationary. As these devices are mobile, the understanding is that the device can gain access to the internet without being in the same location/vicinity as the ISP subscription. By living in today's world, Plaintiff has to be aware that neighbors, strangers, passersby, and hackers can access a wireless router outside of the Identified Address. *See Patrick Collins, Inc. v. Does*, 288 F.R.D. 233, 238 (E.D.N.Y. 2012)(finding that even a secured wireless network is not safe from being hacked and courts decline to impose a duty upon subscribers to vigilantly guard wireless networks).

Indeed, to assert a claim of copyright infringement, Plaintiff must show ownership of a valid copyright and actual violation by the Defendant of one or more of the exclusive rights as set forth in 17 U.S.C. §106 (1)-(6). 17 U.S.C. § 501(a) (2002). In order to establish a prima facie claim of copyright infringement, there must be a direct link between the alleged defendant and the unlawful act. *See Malibu Media v. Tsanko*, 2013 U.S. Dist. LEXIS 169186 (D.N.J. November 30, 2013)(citing *Dun & Bradstreet Software Servs. V. Grace Consulting, Inc.*, 307 F.3d 197 (3d Cir. 2002). Plaintiff has pled no facts or allegations to establish that Defendant has violated the exclusive rights as set forth in §106(1), (3), (4) and (5). In fact, Plaintiff has merely declared that "Defendant downloaded, copied, and distributed a complete copy of Plaintiff's works without authorization". Amended Complaint ¶ 20. By making such a claim, Plaintiff did exactly what the Court warned against. In disregarding the Court's Order, Plaintiff relied solely on the ISP Subscription Details and arbitrarily inserted Defendant's name into the Amended Complaint without a further determination of whether Defendant actually committed the copyright infringement. All references to Defendant in the Amended Complaint could signify nearly any individual.

As required by the courts, after receiving the ISP Subscription Details, Plaintiff must also determine if that subscriber “actually” caused the copyright infringement. Again, Plaintiff’s Amended Complaint has failed to do so. Instead, Plaintiff’s Amended Complaint was based solely on the ISP Subscription Details, despite being warned numerous times by courts of its insufficiency to create a direct link between the Defendant and the copyright infringement. Plaintiff’s Amended Complaint is nothing more than countless conclusory statements without any direct link to Defendant whatsoever. Plaintiff arbitrarily identified Defendant as the infringer despite the courts having explicitly stated that ISP Subscription Details are not enough to establish a direct link between Defendant and the unlawful act. There are no facts beyond the IP address to show Defendant, an unknown infringer, actually violated copyright law. Therefore, a prima facie claim of copyright infringement cannot be established because the Amended Complaint failed to comply with the Court’s instruction, and most importantly, have not met the required pleading standard under *Ashcroft* and *Twombly*.

b. Plaintiff’s Amended Complaint is Inaccurate and Misleading.

Plaintiff has included inaccurate and misleading statements in the Amended Complaint that are nothing more than a bare attempt to support the conclusory statements lodged against Defendant and cover up what Plaintiff is lacking – facts establishing a direct link between Defendant and the copyright infringement. For example, Plaintiff alleged that "Defendant is a persistent online infringer". Amended Complaint ¶ 2. This is simply not so. In order to identify Defendant as a persistent infringer, Defendant would have to infringe multiple times, yet there is no factual allegation to support that Defendant infringed once. Plaintiff alleged that each hit date was "set forth on Exhibit B", however, according to Exhibit B, the only hit date alleged was March 2, 2015, with a majority of the alleged "hits" happening at the same time. Thus, the exhibit as relied upon, cuts against the allegations set forth in Plaintiff's own Amended Complaint.

Additionally, Plaintiff has alleged that "Defendant copied and distributed a large file containing one hundred and twenty seven (127) separate movies… [which] contains a significant percentage of movies available on Plaintiff's website." Amended Complaint ¶ 2. Plaintiff's website, www.x-art.com, boasts of having seven hundred and fifty plus (750+) videos available to watch. X-ART, http://www.xart.com/join/ (last visited March 29, 2016). A calculation of the list, as set forth in Exhibit B, demonstrates that one hundred and twenty seven (127) movies of seven hundred and fifty plus (750+) movies is at most seventeen percent (17%) of videos available on Plaintiff's website, which cannot be identified as "significant" by any stretch of the imagination.

Moreover, Plaintiff has been put on notice by various district courts for years regarding its aggressive litigation tactics. For instance, one court noted that

"Malibu [Media, Plaintiff] is a prolific litigant: between January and May 2014…, Malibu was responsible for 38% of copyright lawsuits filed in the United States." *Malibu Media, LLC v. Doe*, 2015 U.S. Dist. LEXIS 87751, *at 9 (S.D.N.Y. July 6, 2015)(internal citation omitted). The court has also noted "Malibu's corporate strategy relies on aggressively suing for infringement" and "employing tactics clearly calculated to embarrass defendants." *Id*. In the instant case, Plaintiff has listed titles that are "extremely racy and lewd," such as "Cum In Get Wet", "Dripping Desires", "Tight and Wet", and "Listen to Me Cum", which bolster that Plaintiff's expansive listing of the titles in Exhibit B was in an effort to embarrass Defendant. Exhibit B.

Plaintiff's entire Amended Complaint is flawed. It is muddled with conclusory statements, unsupported allegations, and irrelevant technological information, and yet there are no facts to establish that Defendant is the copyright infringer. As suggested by the court, it is evident that Plaintiff's Amended Complaint is not only an attempt to hold Defendant out as a scapegoat for a myriad of downloads solely due to an alleged ISP subscription, but also acts as a vehicle for Plaintiff to advance their corporate strategy.

IV. Conclusion

For the reasons outlined hereinabove, Defendant respectfully requests that the Court grant Defendant's Motion to Dismiss as it has been demonstrated that Plaintiff's Amended Complaint fails to plausibly allege a claim to relief based on copyright infringement.

Dated: March 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on, March 29, 2016, I electronically filed the foregoing document with the Clerk of Court and all parties using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

By: /s/ *Patricia Lawrence-Kolaras*
Patricia Lawrence-Kolaras, Esq.